U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

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U.S. Citizenship and Immigration Services

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

FILE: EAC 01 248 50320 Office: VERMONT SERVICE CENTER Date: FEB 03 2004

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker or professional. The petitioner is an international freight-forwarding firm. It seeks to employ the beneficiary permanently in the United States as an operations manager. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director determined that the petitioner had failed to establish its continuing ability to pay the proffered salary as of the visa priority date.

On appeal, the petitioner, through counsel, argues that the director failed to properly credit the provision of other benefits paid to the beneficiary as part of the proffered wage.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g) provides:

> (2) *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this matter is based, in part, upon the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5 (d). The petition's priority date in this instance is October 30, 2000. The beneficiary's salary as stated on the labor certification is $85,300 per annum based on a 40-hour week. The record indicates that the petitioner is organized as a corporation and was established in 1996. Form ETA 750, Part B, signed by the beneficiary, reflects that she has worked for the petitioner since January 1997.

The Immigrant Petition for Alien Worker (I-140) was filed on October 30, 2000. Along with documentation related to the beneficiary's educational and employment experience, the petitioner submitted a letter from its accountant, [redacted] dated June 29, 2001. The letter describes an attached summary as representative of the beneficiary's earnings and benefits received from the petitioner. The beneficiary's benefits are presented as those received as of the year ending May 31, 2001. They include a salary of $30,000; an automobile including parking, fuel, insurance, and a lease valued at $11,496; apartment rental including living expenses of $39,300; and an annual trip home consisting of airfare and expenses of $2,800. Mr [redacted] explains that the automobile is mostly used for business but is available for the beneficiary's personal use when not engaged on company business. He also states that the petitioner maintains the apartment that the beneficiary resides in because it is

also the venue of the petitioning company's entertainment events. Mr. [redacted] affirms that the company's financial situation is secure.

On October 10, 2001, the director requested additional evidence to support the petitioner's ability to pay the beneficiary's annual wage offer of $85,300 beginning at the priority date of October 30, 2000 and continuing to the present. The director specifically instructed the petitioner to submit its 2000 federal tax return and copies of the beneficiary's Form W-2, Wage and Tax Statement for 2000 showing how much the beneficiary was paid.

Counsel's response included copies of the beneficiary's W-2 for the year 2000, a copy of the beneficiary's Form 1040 EZ, Income Tax Return for Single and Joint Filers With No Dependents for the year 2000, and a letter from Mr. [redacted] dated October 19, 2001. The letter is submitted along with a duplicate copy of the beneficiary's schedule of earnings and benefits previously offered. The beneficiary's W-2 shows that the petitioner paid $30,000 to the beneficiary as wages in 2000. The beneficiary's individual federal income tax return also shows that she declared an income of $30,000 in the year 2000. The only difference between the accountant's first letter and the one dated October 19, 2001 is an added notation that the beneficiary's cash earnings were increased to $40,000 per year as of January 1, 2001. Mr. [redacted] asserts that the beneficiary's W-2 reflects only the cash portion of the beneficiary's wages taxable to her.

Counsel also included a copy of the petitioner's Form 1120, U.S. Corporation Income Tax Return for the year 2000. The petitioner's 2000 corporate tax return indicates that it declared a taxable income before net operating loss deduction (NOL) and special deductions of $13,005. Its current assets revealed on Schedule L were $25,700, and its current liabilities were $2,461, producing net current assets of -$23,239. Net current assets are the difference between current assets and current liabilities. It identifies the level of a petitioner's liquidity at the beginning and end of the tax year as reflected on Schedule L of a corporate tax return. CIS will consider net current assets in reviewing a petitioner's ability to pay a beneficiary's proposed salary because it represents the amount of cash or cash equivalents that would reasonably be available to pay the proffered wage as set forth on the Schedule L balance sheet.

The director denied the petition, concluding that the non-cash benefits described by the accountant do not represent wages and that the schedule of benefits and wages summarizing compensation to the beneficiary did not convincingly reflect the financial health of the petitioner. The director noted that there was no evidence submitted that persuasively established the petitioner's ability to pay the wage offer of $85,300 set forth on the approved labor certification.

On appeal, counsel argues that the director mischaracterized the automobile, apartment and other benefits paid to beneficiary. He submits a letter from [redacted] an accountant, dated February 22, 2002. Mr. [redacted] declares that Mr. [redacted] conclusion that the benefits provided to the beneficiary were non-taxable was incorrect and should have been reflected on her W-2. Mr. [redacted] asserts that the benefits paid to the beneficiary were included in the corporate tax return and should be added back to the petitioner's net income. He also contends that the company's accounts receivables are not reflected in the tax return because the petitioner uses the cash method of accounting, which recognizes revenue only when it is received in order to minimize tax liability. It is also noted that this method tends to understate expenses because recognition of liabilities/expenses occurs when they are due not when they are incurred.

Counsel's and Mr. [redacted] arguments are not persuasive in this case. The proposed wage on the approved labor certification is expressed in U.S. currency and not a formula reflecting the Department of Labor's consideration of the value of housing, automobiles and trips home, but rather on a determination of the prevailing wage pursuant to the regulatory requirements set forth at 20 C.F.R. § 656.40. Further, the regulation at 20 C.F.R. § 656.20 (c)(3) clearly provides that the wage offered must not be "based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis."

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava,* 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. The court refused to consider income before expenses were paid. Finally there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh,* 719 F. Supp. 532, 537 (N.D. Tex. 1989). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava,* 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Ubeda v. Palmer,* 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd,* 703 F.2d 571 (7th Cir. 1983).

Here, both the petitioner's income and net current assets as declared on its federal tax return for 2000 were insufficient to meet the proffered salary of $85,300 per annum. This is true even if the beneficiary's W-2 declared income of $30,000 in 2000 were considered.

Beyond the decision of the director, the record of proceeding in this case raises a fundamental question as to whether the petition is based on a bona fide job offer.

The petitioner's 2000 corporate tax return discloses that the beneficiary holds a significant ownership interest in the petitioning business; in fact, she is listed as the 100% shareholder. [redacted] as "Managing Director" signed the visa petition and the labor certification on behalf of the petitioner. The labor certification indicates that the "president," who is not identified, will immediately supervise the beneficiary. Mr. [redacted] July 13, 2001 letter stated that he was the accountant for the business that "[the beneficiary] is currently the owner of, ACC Logistics Ltd. . . ."

In *Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in the petitioning business, if the alien beneficiary's true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. That case relied upon a Department of Labor advisory opinion in invalidating the labor certification. The regulation at 8 C.F.R. § 656.30(d) provides that [CIS], the Dept. of State or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification.

In *Hall v. McLaughlin,* 864 F.2d 868 (D.C. Cir. 1989), the court affirmed the district court's dismissal of the alien's appeal from the Secretary of Labor's denial of his application for labor certification. The court found that where the alien was the founder and corporate president of the petitioning corporation, absent a genuine employment relationship, the alien's ownership in the corporation was the functional equivalent of self-employment.

Although this appeal is being dismissed on other grounds, it is noted that the facts revealed by the record reflecting the beneficiary's ownership of the petitioner potentially represent a significant impediment to the approval of an employment based visa petition filed by this petitioner on behalf of this alien that is based on a labor certification. Further investigation may be warranted, including consultation with the Department of Labor.

In view of the foregoing, following a review of the record and consideration of the facts and arguments presented on appeal, it cannot be concluded that the petitioner has demonstrated a continuing ability to pay the proffered wage.

ORDER: The appeal is dismissed.